IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 302 OF 1995

1. Smt. Bhagirathibai w/o.
   Machindra Bothare
2. Vasant Machindra Bothare ..Appellants

versus

1. The State of Maharashtra
2. Mohamad Kasam Mohamad Buran Sayyad
3. Ashok Dattatraya Bhange
4. Ramling Machindra Bothare
5. Kumar Mahindra Bothare ..Respondents

Miss. Kranti Hivrale h/f. S. D. Thakore for the Appellants.

Mr. S. N. Gawade, A.G.P. for the Respondents.

Appeal dismissed against Respondent Nos. 2 and 3 vide order dated 17.8.1994.

None present for the Respondent Nos. 4 and 5.

CORAM : D. G. DESHPANDE,J.

DATE : 19TH JANUARY,2005

ORAL ORDER :

1. Heard counsel for the appellants and the learned AGP for the State.

2. This appeal is filed by the original claimants who had filed claim petition before the MACT, Solapur, in Motor Accident Claims Petition No.39 of 1984 claiming compensation at Rs.50,000/-. The appellant No.1 Bhagirathibai is the widow of the deceased Machindra Bothare who left behind the original petitioner No.2 and original opponent Nos. 3 to 5 as his sons. The accident occurred on 2.10.1983 at 12.30 in the afternoon. The deceased was crossing road. Admittedly the said road runs east - west i.e. Solapur is situated towards east while Pune is situated towards the West. The deceased was wanted to go towards the northern end of the road. However when he was in the middle of the road, a truck bearing No.ATT 1135 came in the high speed, it was driven by the original opponent No.2. It gave dash to the deceased as a result of which he fell down. At the same time State Reserve police Van No. MZA 3933 came from Solapur and was proceeding towards Pune. The original opponent no.3 was driving the police van in high speed rashly and negligently. When the deceased was thrown on account of the dash given by the truck he came under the police vehicle. He received serious injuries. He was admitted to the hospital and he died on 21.10.1983. He was 60 years of age at that time. He was retired police constable, and therefore claim petition for Rs.50,000/- was filed.

3. The Tribunal dismissed the claim petition holding that the petitioners have not proved the panchnama of the place of accident, the inquest, post mortem notes and also the FIR and this was done by the petitioners as the documents were against the petitioners. The tribunal observed in this background that " **In fact unless and otherwise these documents are produced alongwith the petition, the application itself is not maintainable in law."**

4. Learned AGP tried to contend that these observations of the court are justified but he could not point out any legal provision under which filing of those documents was mandatory and petition could not be entertained unless these documents were filed and the petition was not maintainable without filing these documents. The observation is without any basis so also the finding of the court below and it has to be set aside.

5. Secondly regarding the accident and the liability of the State, the learned AGP contended that the important documents like FIR, panchnama were not filed and claimant were relying upon the evidence of doctor. He also contended that filing and proving post mortem notes was necessary.

6. The claimant has examined a person who was eye witness to the incident. He is Krishna Shatrughna Sonawane eye witness for the petitioners. In his evidence he has stated that his house and the firewood depot is situated at a distance of about 5 feet from Tambhurni Solapur Road. i.e. Pune Solapur Road. This road runs east west i.e. Solapur is situated towards the east while Pune is towards the west. He was at the distance of 5 feet from the southern edge of Tar Road. There was one truck facing towards west and it was at a distance of 15 feet from his house and at that time police van came from Solapur side to go to Pune. It was in high speed and it gave dash to the deceased from the backside. The deceased came in between the two rear wheels of the police van. The diver of the police van applied brakes and halted at a distance of 10 feet from the victim.

7. Learned AGP tried to contend that there is no proof of death of the victim in the accident. His attention was drawn by me to the reply given by the State to the claim petition wherein everything excepting the liability of the police is admitted. In view of this reply, learned AGP cannot be permitted to advance such arguments.

8. As against the evidence and the particulars

in the reply filed by the State which is also signed by the driver of the vehicle, it is clear that the evidence has not been properly appreciated. Counsel for the appellants therefore contended that when the eye witness is there and no evidence is in rebuttal adduced by the State and even the driver of the police van was not examined, then firstly the evidence of the eye witness should be accepted and secondly adverse inference be drawn against the State.

9. Drawing of adverse inference is not necessary but the fact remains that the evidence of eye witness examined by the claimants is on record. From the manner in which the accident occurred, it is clear that the deceased fell on the ground because of the dash given by the truck and thereafter his legs crushed because of the police van. This is a case of the applicants in their claim petition and that is also a case of the State in their reply. In view of these facts it is a case of contributory negligence. The accident took place in 1983 compensation claimed was Rs.50,000/=. Since it is a case of contributory negligence and since owner, driver or the Insurance company of truck ATT 1135 has not been joined, 50% claim at the most can be granted, therefore following order:

ORDER

The Appeal is partly allowed. Respondent No. 1 to pay Rs.25,000/= (Rupees Twenty Five Thousand) to the appellants with interest at the rate of 9% per annum from the date of their application until payment. Payment to be made within eight weeks from today, without fail Certified copy expedited and the same be supplied to the parties immediately.

19/1/2005 (D.G. DESHPANDE,J.)